No. 89-1653

In The

Supreme Court of the United States

October Term, 1989

KENNETH V. HEMMERLE,

Petitioner,

vs.

BRAMALEA, INC., f/k/a
BRAMALEA DEVELOPMENT U.S., LTD.,
a Delaware corp.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

JOEL S. PERWIN, ESQ.
Counsel of Record
PODHURST, ORSECK, JOSEFSBERG,
EATON, MEADOW, OLIN &
PERWIN, P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130
(305) 358-2800

May 16, 1990

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. WHETHER THE FLORIDA TRIAL COURT'S DIRECTED VERDICT FOR THE RESPONDENT ON HIS STATE-LAW CLAIMS IMPLICATED OR VIOLATED ANY FEDERAL CONSTITUTIONAL RIGHTS.

2. WHETHER THE FLORIDA TRIAL COURT'S AWARD OF ATTORNEYS' FEES TO THE RESPONDENT UNDER A FLORIDA STATUTE IMPLICATED OR VIOLATED ANY FEDERAL CONSTITUTIONAL RIGHTS.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

STATEMENT OF THE CASE..... 1

ARGUMENT 8

1. Mr. Hemmerle's Challenge to the State Court's Directed Verdict on His State-Law Claims Presents No Substantial Federal Question..... 8

2. The State Court's Enforcement of the State Statute Awarding Attorney's Fees Presents No Substantial Federal Question..... 10

CONCLUSION 13

TABLE OF CASES

Page

Beaty v. Richardson, 276 U.S. 599 (1928) 9

Beck v. Washington, 369 U.S. 541 (1962) 9

Bould v. Touchette, 349 So.2d 1181 (Fla. 1977) 8

Castor v. State, 365 So.2d 701 (Fla. 1978) 8

Clark v. State, 363 So.2d 331 (Fla. 1978) 8

Consolidated Turnpike Co. v. Norfolk & O.V.R. Co., 228 U.S. 326 (1913) 9

Devon-Aire Villas Homeowners Association, No. 4, Inc. v. Americable Associates, Ltd., 490 So.2d 60 (Fla. 3d DCA 1985) 9

Dober v. Worrell, 401 So.2d 1322 (Fla. 1981) 8

Edelman v. People of State of California, 344 U.S. 357 (1953) 8

Engle v. Isaac, 456 U.S. 107 (1982) 8

Forbes v. State Council, 216 U.S. 396 (1910) 9

Graver Tank & Manufacturing Co. v. Linde Co., 336 U.S. 271 (1949) 9

Hanson v. Denckla, 357 U.S. 235 (1958) 9

Henderson v. Antonacci, 62 So.2d 5 (Fla. 1952) 8

Herndon v. Georgia, 295 U.S. 441 (1935) 9

Irvine v. People of California, 347 U.S. 128 (1954) 10

John v. Paullin, 231 U.S. 583 (1913) 9

Mazer v. Stein, 347 U.S. 201 (1954) 10

Parker v. North Carolina, 397 U.S. 790 (1970) 8

TABLE OF CASES – Continued

Page

Polyglycoat Corp. v. Hirsch Distributors, Inc., 442 So.2d 958 (Fla. 4th DCA), *review dismissed*, 451 So.2d 848 (Fla. 1984) 9

Proulx v. County of Lee, 466 So.2d 253 (Fla. 2d DCA), *review dismissed*, 472 So.2d 1182 (Fla. 1985) 9

Radio Station WOW v. Johnson, 326 U.S. 120 (1945) 9

Rogers v. Lodge, 458 U.S. 613 (1982) 9

Sag Harbour Marine, Inc. v. Fickett, 484 So.2d 1250 (Fla. 1st DCA), *review denied*, 494 So.2d 1150 (Fla. 1986) 9

Smith v. Ervin, 64 So.2d 166 (Fla. 1953) 8

The Florida Bar; Re: Amendment to Rules of Civil Procedure, Rule 1.442 (Offer of Judgment), 550 So.2d 442 (Fla. 1989) 12

United States v. Doe, 465 U.S. 605 (1984) 9

United States v. Johnston, 268 U.S. 220 (1925) 9

Wainwright v. Sykes, 433 U.S. 72 (1977) 8

Wolfe v. North Carolina, 364 U.S. 177 (1960) 9

AUTHORITIES

§ 45.061, Fla. Stat. (1989) 6

R. Stern, E. Gressman, S. Shapiro, *Supreme Court Practice* 236-39 (6th ed. 1986) 10

The respondent, Bramalea, Inc., respectfully requests that this Court deny the petition for writ of certiorari, seeking review of two decisions of the District Court of Appeal of Florida, Fourth District, in this case. The decision on the merits in Case No. 84-3281, a per-curiam affirmance without opinion, is not reported, and is reprinted at p. 61 of the petitioner's appendix ("App."). The decision on the issue of attorneys' fees in Case No. 88-1844 is reported at 547 So.2d 203, and is reprinted at App. 73-75.

STATEMENT OF THE CASE

Petitioner Hemmerle has challenged the Florida trial court's direction of a verdict against him on all of the (state-law) claims which he brought against respondent Bramalea. The judgment was affirmed by the Florida district court of appeal in Case No. 87-3281 (App. 61), and the Florida Supreme Court dismissed the petition for review (App. 72). Petitioner Hemmerle also has challenged the Florida trial court's award of attorneys' fees to Bramalea under a Florida statute, which the Florida appellate court affirmed in Case No. 88-1844 (App. 73), after which the Florida Supreme Court denied review (App. 80).

I. The Directed Verdict. On the former question, Mr. Hemmerle has offered an eight-page summary of the evidence purportedly introduced, without providing a single citation to the trial transcript. He therefore has failed to provide this Court with a sufficient evidentiary basis upon which to appraise the trial court's direction of

a verdict against him on all counts, even assuming *arguendo* that an error in doing so implicated any federal constitutional rights. Although it would be inappropriate for us to undertake the petitioner's burden of summarizing the evidence of record in the light most favorable to his position, we offer below the following abbreviated summary.

As Mr. Hemmerle has stated (Pet. 5-8), he and Bramalea entered into a series of contracts for the purchase and/or development of real property; encountered a number of difficulties; and subsequently entered into a settlement of all claims growing out of these transactions, for which Mr. Hemmerle received $1 million (P.X. 67). At the same time that he was negotiating that settlement, however, Mr. Hemmerle was secretly conveying some of his rights in the project to a corporation which he controlled, so as to retain those rights and keep the $1 million settlement at the same time (*see* Record on Appeal ("R.") at 269-75, 279, 353, 356, 391-400, 443-46, 967-68, 1073-74, 1078-79, 1103-04; D.X. 2, 16). When that scheme unraveled, and Mr. Hemmerle was forced to execute additional releases on behalf of his corporation (P.X. 68; *see* R. 269, 454), Mr. Hemmerle devised an alternative plan for having it both ways. He filed an action charging Bramalea not only with breaching some of the very contracts which he had compromised in return for $1 million, but also with fraud (R. 1439-77). After Mr. Hemmerle had presented his case for six days (R. 1-1294), the trial court concluded that he had failed to create an issue for the jury on any of his claims, and directed a verdict against him (R. 1412-16).

In Counts I and IV of the complaint, Mr. Hemmerle sought recission of the settlement agreement (P.X. 67) on the basis of the single allegation that he had executed the agreement in reliance upon the allegedly-fraudulent misrepresentation that Bramalea would give him a right to bid for the job of constructing any improvements on the property (R. 1441, 1444). In Counts II and III of the complaint, Mr. Hemmerle brought contract claims on the basis of an alleged agreement (which Mr. Hemmerle later testified was an oral agreement, *see* R. 1186-90) assertedly made before the settlement agreement was executed, under which Bramalea had promised to pay him interest "at prime" on a certain sum of money held in escrow by Bramalea's attorneys (R. 1442-44). These two counts, of course, also depended upon the invalidity of the settlement agreement, under which Mr. Hemmerle had compromised all pre-existing claims. Finally, in Count V of the complaint, Mr. Hemmerle alleged that Bramalea had breached a contractual obligation to pay a specified sum of money in consideration of his assistance to Bramalea in purchasing a specific piece of property (R. 1445-46). This count too depended upon invalidating the settlement agreement.

After hearing Mr. Hemmerle's case, the trial court found no evidence that the settlement agreement had been procured by fraud, and therefore directed a verdict against Mr. Hemmerle on all counts (R. 1412-16). In making the motion, as Mr. Hemmerle himself had pleaded in his complaint (R. 1441, 1444), Bramalea acknowledged that under Florida law, a statement of future intention

may be actionable as fraud, but argued that Mr. Hemmerle had offered no evidence "that Bramalea had already at [the time of the alleged promise to permit Mr. Hemmerle to bid on any improvements on the property] had no intention of performing or had no intention of constructing on that project" (R. 1329). At most, therefore, Mr. Hemmerle had proved a breach of promise, but a breach of promise is not actionable as fraud in Florida, in the absence of "an intention to breach that promise at the time the misrepresentation was made" (R. 1330).

Contrary to Mr. Hemmerle's suggestion (Pet. 11), the trial court understood the point precisely, recognizing that a statement of future intention may be actionable as fraud in Florida, but that the "mere non-performance of a promise without a showing of fraudulent intent, wouldn't withstand the motion for directed verdict" (R. 1412). To the contrary, "there would have to be some evidence that there was intent at the time the promise was made to defraud the opposing parties" (R. 1413), and the trial court directed a verdict for Bramalea because "there is no evidence of intent as would be necessary . . . " (*id.*). Thus, there was no evidence that the settlement agreement had been secured through fraud, and the settlement agreement had compromised all of the claims which Mr. Hemmerle had brought against Bramalea.

Mr. Hemmerle appealed to the district court of Florida, and Bramalea sought to defend the trial court's ruling not only on the basis of the settlement agreement which the trial court had found controlling, but on a number of alternative bases. On the two fraud counts, Bramalea argued that for three independent reasons, Mr. Hemmerle

had offered no evidence that he had been damaged by Bramalea's alleged misstatement (damage is an element of liability for fraud under Florida law): 1) he had failed to prove that even if permitted to bid on development of the property, he would have submitted the low bid; 2) whether or not the settlement agreement had been the product of fraud, Mr. Hemmerle had executed an earlier agreement in which he had compromised the same claims; and 3) Mr. Hemmerle had assigned away any and all rights to develop the property, and therefore was not the real party in interest (*see* Brief of Appellee at 15-21, Case No. 87-3281).

On the contract claims growing out of an alleged oral agreement to pay interest on some escrowed funds, Bramalea argued for affirmance 1) because the earlier agreement had released the same claim; and 2) because the evidence was uncontradicted that Bramalea in fact had paid Hemmerle the money in question, in the form of a credit on another transaction (*id.* at 23-24). And on the contract claims concerning interest on some escrowed funds, Bramalea argued 1) that the earlier release was controlling; 2) that the claim was barred by the applicable statute of limitations; 3) that Mr. Hemmerle had offered no competent evidence upon which to compute the amount of interest allegedly owed; and 4) that having assigned away his interest in this claim, Mr. Hemmerle had no standing to bring it (*id.* at 26-28). As we have noted, the district court of appeal affirmed the judgment entered on the directed verdict without opinion (App. 61). Therefore, it is impossible to know which of these many alternative arguments the appellate court may have accepted.

II. The Attorneys' Fees. On the question of attorneys' fees in Case No. 88-1844, the relevant facts are the following. About a week before the trial, Bramalea sent a certified letter to Mr. Hemmerle which said the following: "Pursuant to the recently enacted Section 45.061 of Florida Statutes, this will constitute Bramalea's written Offer of Judgment in the amount of $75,000" (R. 2867). Mr. Hemmerle has quoted the statute at pages 2-5 of his petition. It subjects the losing party to attorneys' fees who has rejected an offer of settlement which was 25% or more higher (for the plaintiff) or 25% or more lower (for the defendant) than the amount actually awarded at trial.

On the day after the trial court's direction of a verdict for Bramalea on all counts, Bramalea filed its motion to tax costs, which mistakenly invoked another section of the Florida Statutes instead of § 45.061 (R. 2838-39). At a subsequent hearing, as Mr. Hemmerle has pointed out (Pet. 13), Bramalea orally moved to amend its motion to invoke § 45.061, and in granting the motion, as Mr. Hemmerle himself acknowledged subsequently (*see* Brief of Appellant at 2, Case No. 88-1844), the trial court granted Mr. Hemmerle an additional ten days in which to file a memorandum of law addressed to § 45.061. Mr. Hemmerle did file a legal memorandum addressing the statute, but the trial court nevertheless entered an award of attorneys' fees for Bramalea.

On appeal, the district court accepted Mr. Hemmerle's contention that § 45.061 "is substantive and that it may not be given retrospective application" (App. 74). Although the effective date of § 45.061 post-dated Mr. Hemmerle's complaint against Bramalea, however, the district court concluded that its application in this case

had not been retroactive. To the contrary, because Bramalea's offer of settlement and Mr. Hemmerle's rejection of that offer had both been made after the effective date of the statute, its application had not been retroactive (App. 74):

> What event triggers the remedy provided by the statute? We do not agree . . . that the triggering event is accrual of the cause of action. Neither do we think that it is the commencement of the litigation. Rather, the operative event, the only event crucial to operation of the statute, is the making of an offer of settlement. Only upon the making of an offer of settlement are the respective rights and duties of the parties aligned according to the requirements of the statute, and at that time both parties are free to respond or not to the policies embodied in the statutory scheme without reference to any earlier events. Since the offer of settlement in this case was made after the effective date of section 45.061, we find no impediment to application of the statute.

The appellate court also rejected Mr. Hemmerle's contention that the trial court had erred in permitting Bramalea to amend its motion to invoke the statute, because the initial error "was corrected in due course and appellant was not at all prejudiced by the original mistake" (App. 74).

In an amended motion for rehearing (App. 76), Mr. Hemmerle, for the first time, raised a constitutional argument which was directly inconsistent with his primary argument on appeal. The earlier (retroactivity) argument depended on the assumption that the statute is substantive in nature, and the appellate court had agreed with Mr. Hemmerle that the statute "is substantive . . . " (App.

74). Now, Mr. Hemmerle argued that the statute was procedural, and therefore violated the Florida courts' rulemaking authority (App. 76). Without explanation, the appellate court denied the motion (App. 79).

ARGUMENT

1. Mr. Hemmerle's Challenge to the State Court's Directed Verdict on His State-Law Claims Presents No Substantial Federal Question.

In light of the foregoing, Mr. Hemmerle's challenge to the directed verdict on his claims of fraud and breach of contract can only be described as frivolous. First, as Mr. Hemmerle has implicitly acknowledged (*see* Pet. 15-16), he raised no federal question in the trial court, and therefore has failed to preserve such a question for this Court's review.[1]

Second, Mr. Hemmerle has acknowledged (Pet. 15-16) that he raised a federal constitutional question for

---

[1] Florida law requires that in the absence of fundamental error, all issues must be raised at the trial level to be preserved for appellate review. *See Dober v. Worrell*, 401 So.2d 1322 (Fla. 1981); *Castor v. State*, 365 So.2d 701 (Fla. 1978); *Bould v. Touchette*, 349 So.2d 1181 (Fla. 1977). That includes constitutional challenges. *See Clark v. State*, 363 So.2d 331 (Fla. 1978); *Smith v. Ervin*, 64 So.2d 166 (Fla. 1953); *Henderson v. Antonacci*, 62 So.2d 5 (Fla. 1952). Under this Court's decisions, Mr. Hemmerle's failure to satisfy the state's preservation requirement was fatal. *See Engle v. Isaac*, 456 U.S. 107, 124-35 (1982); *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Parker v. North Carolina*, 397 U.S. 790, 798 (1970); *Edelman v. People of State of California*, 344 U.S. 357 (1953).

the first time in the state appellate court only in his motion for rehearing. Under Florida law, that was too late.[2] Under this Court's decisions, that too was fatal.[3]

Third, regardless of the state's practice, the general rule in this Court is that if the federal question was raised for the first time in a motion for rehearing in the state court, this Court will not consider it unless the state court expressly addressed the issue in adjudicating the motion for rehearing.[4] In the instant case, the motion was denied without explanation (App. 71).

Fourth and finally, even if the issue had properly been raised, it is not generally this Court's function to review the sufficiency of evidence, even on federal questions.[5] And although this Court has done so on

---

[2] *See Devon-Aire Villas Homeowners Association, No. 4, Inc. v. Americable Associates, Ltd.*, 490 So.2d 60, 68 (Fla. 3d DCA 1985); *Sag Harbour Marine, Inc. v. Fickett*, 484 So.2d 1250, 1256 (Fla. 1st DCA), *review denied*, 494 So.2d 1150 (Fla. 1986); *Proulx v. County of Lee*, 466 So.2d 253 (Fla. 2d DCA), *review dismissed*, 472 So.2d 1182 (Fla. 1985); *Polyglycoat Corp. v. Hirsch Distributors, Inc.*, 442 So.2d 958 (Fla. 4th DCA), *review dismissed*, 451 So.2d 848 (Fla. 1984).

[3] *See Beck v. Washington*, 369 U.S. 541, 549-54 (1962); *Wolfe v. North Carolina*, 364 U.S. 177, 195 (1960); *Herndon v. Georgia*, 295 U.S. 441, 443 (1935); *Beaty v. Richardson*, 276 U.S. 599 (1928); *John v. Paullin*, 231 U.S. 583, 585 (1913).

[4] *See Hanson v. Denckla*, 357 U.S. 235, 243-44 (1958); *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945); *Herndon v. Georgia*, 295 U.S. 441, 443 (1935); *Consolidated Turnpike Co. v. Norfolk & O.V.R. Co.*, 228 U.S. 326, 333-34 (1913); *Forbes v. State Council*, 216 U.S. 396, 399 (1910).

[5] *See United States v. Doe*, 465 U.S. 605 (1984); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *Graver Tank & Manufacturing Co. v. Linde Co.*, 336 U.S. 271, 275 (1949); *United States v. Johnston*, 268 U.S. 220, 227 (1925).

occasion in considering important federal questions, we are aware of no decisions in which this Court has accepted jurisdiction solely to review the sufficiency of the evidence to support a judgment entered by a state court on an issue of state law. To the contrary, this Court has accepted review of state-court decisions only when they have passed upon the validity of federal statutes or treaties, or have held a state statute to be repugnant to the federal Constitution, or have created some important issue or conflict on an issue of federal law. *See generally* R. Stern, E. Gressman, S. Shapiro, *Supreme Court Practice* 236-39 (6th ed. 1986) (and cases cited). In the light of the foregoing observations, the petitioner's first issue can only be described as frivolous.

2. The State Court's Enforcement of the State Statute Awarding Attorney's Fees Presents No Substantial Federal Question.

For similar reasons, the petitioner's second argument also presents no substantial federal question. First, as Mr. Hemmerle has admitted (Pet. 17), he raised no federal constitutional question at the trial level, and that was fatal. *See supra* n.1. Second, Mr. Hemmerle has advanced here no federal constitutional question which he raised at the appellate level either. Mr. Hemmerle did argue on appeal that the fee statute is substantive, and was impermissibly applied retroactively. But Mr. Hemmerle has not advanced that contention before this Court, and thus has waived it.[6] The one constitutional argument advanced

---

[6] *See Mazer v. Stein*, 347 U.S. 201, 206 n.5 (1954); *Irvine v. People of California*, 347 U.S. 128, 129 (1954).

here (raised for the first time in an amended motion for rehearing in the appellate court, *see* Pet. 17) is that the Florida attorneys'-fee statute violated the separation between the judicial and legislative branches of Florida's government, under the Florida Constitution. Indeed, since we are concerned here with a Florida statute, no federal separation-of-powers argument could have been raised.

Third, even if Mr. Hemmerle had raised a federal constitutional question in his amended motion for rehearing, that was too late under Florida law, and therefore failed to preserve the issue under federal law. *See supra* nn.2, 3. Fourth, even apart from the requirements of Florida law, this Court's decisions have held that the invocation of a federal question for the first time in a motion for rehearing will preserve the issue only if the state court specifically addresses that question. *See supra* n.4. In the instant case, the Florida appellate court denied the motion and amended motion for rehearing without explanation (App. 79).

Fifth and finally, even if the issue had been preserved for this Court's review, it presents no substantial question. Mr. Hemmerle's argument on rehearing was that the attorneys'-fee statute is procedural in nature, and thus that its promulgation by the Florida Legislature infringed upon the Florida Supreme Court's procedural rulemaking authority. As we have noted, that belated contention was directly contrary to the central argument which Mr. Hemmerle had presented in his appellate brief – that the attorneys'-fee statute is substantive in nature, and that the trial court had impermissibly applied it retroactively. In its opinion, the Florida appellate court accepted the

premise of that argument: "We agree . . . that the statute is substantive and that it may not be given retrospective application" (App. 74); but held that because both the offer of judgment and its rejection had been made after the statute's effective date, its application was not retroactive at all (*id.*). Contrary to Mr. Hemmerle's suggestion (Pet. 24), the appellate court's characterization of the statute as substantive was endorsed by the Florida Supreme Court in *The Florida Bar; Re: Amendment to Rules of Civil Procedure, Rule 1.442 (Offer of Judgment)*, 550 So.2d 442 (Fla. 1989). That decision invalidated only certain minor aspects of the statute (for example, some time requirements) as impermissibly procedural, while upholding the rest. Under Florida law, as the Florida Supreme Court and the appellate court in the instant case both correctly held, a statute imposing sanctions for the unreasonable rejection of a settlement offer unquestionably is substantive in nature, and thus is the proper subject of legislative action. As we have noted, that conclusion was made under the Florida Constitution, and thus implicates no federal question; but even if some federal question were implicated, the Florida court's decision unquestionably was correct.

For all of these reasons, on the attorneys'-fee question as well, the petitioner has presented no substantial federal question.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

JOEL S. PERWIN, ESQ.
Counsel of Record
PODHURST, ORSECK, JOSEFSBERG,
EATON, MEADOW, OLIN &
PERWIN, P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130
(305) 358-2800

May 16, 1990